

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
SHERMAN DIVISION

VOCALSPACE, LLC

Plaintiff,

v.

DANIEL D. LORENZO and  
LARKSPARK CORPORATION,

Defendant.

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Civil Action No. 4:09-CV-00350

**DEFENDANT'S EMERGENCY MOTION TO COMPEL PRODUCTION OF  
PLAINTIFF'S SOURCE CODE AND MOTION TO CONTINUE TRIAL SETTING**

Defendants ask the court, on an emergency basis, to compel the plaintiff to produce all computer source code for each of Plaintiff's websites from 2007 forward. Defendants also ask this Court to continue the trial setting of this matter for at least 60 days to give the defendants proper time to analyze the Plaintiffs source code.

**A. Introduction**

1. Plaintiff is Vocalspace, LLC.; defendants are Daniel D. Lorsenso and Larkspark Corporation.

2. Plaintiff sued defendants for copyright infringement and other claims.

3. This case is set for trial on March 21, 2011, less than 2 weeks from now. The parties have attempted mediation on March 7, 2011, but have not yet reached a settlement. Defendants must prepare for trial in the very near future.

4. This court has held previous hearing on Defendants motion to compel discovery and on more than one occasion has indicated the following the ruling on summary judgments that

if the Defendants counterclaims remained that the Court would permit discovery on Plaintiff's Source code.

5. The Court just issued a myriad of summary judgment findings (Dockets 204, 205, 208, 211), and Defendants claims for declaratory judgment, injunctive relief, and claims for conversion of 2007 source code remain active and will be tried before a jury.

B. Argument - Source Code Discovery

6. Defendants must have access to Plaintiff's source code from 2007 and forward so it can present evidence to the Jury on Defendants counterclaims claims for declaratory judgment and conversion. Plaintiff has refused to produced their source code which are integral to the defendants counterclaims Count 1 (Declaratory Judgment); Count 2 (Injunctive Relief); Count 7 (Conversion). All counterclaims mentioned are based on "2007 Code" which is all intellectual property belonging to Defendants pursuant to the disputed 2007 Independent Contractors Agreement. Defendants must have access to Plaintiff's source code from January 1, 2007 forward to have the evidence to be able to put on their claims.

7. Plaintiff is refusing to allow Defendants to have access to the source code due to the fact that Daniel Lorenzo posted the following on his computer blog at <http://www.dantescode.com/>:

Still fighting a lawsuit      Posted by dante on January 10, 2011

As of January, 2011, I am still involved in a lawsuit with a former customer of LarkSpark. LarkSpark is being sued because this customer believes they have a copyright which is being infringed upon. If they were really wronged, you'd think they would have attempted to talk with me some time in the last 2.5 years. Only recently have I received a copy of they code they claim is their copyright and only recently have I

found that they very same code contains a plethora of open source code which they do not have the right to copyright.

I think after this lawsuit is over I may just release my PubClip.com project as 100% open source in order to make sure that the community gets back what it has given. If the assholes suing me want to put me out of business because they have more money (despite the fact they have been wrong all along) then let them have **500 competitors overnight** and see how long they stay in business.

– Dante

*See Copy of web posting, Attached as Exhibit B.*

8. There is a strong protective order in place. See Docket 75. Defendants understand there is a protective order in place and have no intention on violating any protective order. Defendants would not release to the public any source code unless it was permitted under the law. *See Declaration of Dante Lorenzo, attached as Exhibit A.* **Defendant Lorenzo is only permitted to review highly confidential materials such as source code while in his attorney's office pursuant to the protective order, so any argument that Lorenzo is going to make off and disclose Plaintiff's source code is simply paranoia.**

9. There is no basis for the plaintiff to refuse to produce the post 2007 source code to the defendants. The defendants must have the discovery they need to put on their claims. *See Declaration of Dante Lorenzo, attached as Exhibit A.* Plaintiff should produce all source code for all of its websites from 2007 forward, including all subversion files.

#### C. Argument - Request to Continue Trial Setting

10. This court should extend the trial setting and grant additional time for discovery as Plaintiffs have refused to produced their source code which are integral to the defendants counterclaims Count 1 (Declaratory Judgment); Count 2 (Injunctive Relief); Count 7 (Conversion). All counterclaims mentioned are based on "2007 Code" which is all

intellectual property belonging to defendants pursuant to the disputed 2007 Independent Contractors Agreement. Defendants must have access to Plaintiff's source code from January 1, 2007 forward to be able to put on their claims. The requested discovery is relevant and material to defendants claims. *See Declaration of Dante Lorenzo, attached as Exhibit A.*

11. The amount of computer code that will be required to analyze will be substantial, and Plaintiff by refusing to produce the code and forcing the defendants to yet again seek a court hearing has delayed the code production to where it will be impossible for defendants to properly analyze the code and prepare for trial, which is only days away. *See Declaration of Dante Lorenzo, attached as Exhibit A.*

12. Defendants will be substantially prejudiced and suffer harm if they are not permitted to have the proper time to analyze before trial. The deadline to submit all trial exhibits is only 24 hours away, and yet defendants have not seen discovery integral to their claims. The defendants remaining counterclaims are all based on the 2007 and beyond Source code and the defendants cannot put on their case without having the proper time to review the many thousands of files of source code. There simply is not enough time for this single defendant Daniel Lorenzo to review all the materials when he finally does see it, there just is not enough time the day. *See Declaration of Dante Lorenzo, attached as Exhibit A.*

13. The Plaintiff is causing the delay by refusing to produce the requested discovery. The Plaintiff will not be harmed by any delay in trial, given they are the ones who are refusing to produce the discovery. *See Declaration of Dante Lorenzo, attached as Exhibit A.*

14. Defendants have been trying to get the evidence for many months and has diligently used the discovery procedures. Defendants have brought this issue before the court several

times and still the Plaintiff refuses to produce the source code that has been requested. *See Declaration of Dante Lorenzo, attached as Exhibit A.*

15. This delay in trial setting is sought so that justice may be done. Defendants are asking for the trial setting to be extended for sixty days to allow for the production and proper analysis of the Plaintiff's source code.

C. Conclusion

16. This court should order plaintiff to immediately produce all source code that it has for all of its websites from 2007 forward (including all subversion files), and also continue the trial setting for a period of sixty days from the current trial setting of March 21, 2011.

Respectfully submitted,

/s/ Ernest P. Nycz  
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ATTORNEY FOR DEFENDANTS

CERTIFICATE OF CONFERENCE

I certify that I have had a telephone conferences with opposing counsel (Neal Massand), in attempts to solve this discovery dispute and motion for continuance without intervention from the Court. The issues in this motion remain outstanding and defendants request a ruling from the Court in this dispute.

/s/ Ernest P. Nycz  
ERNEST P. NYCZ

CERTIFICATE OF SERVICE

I hereby certify that on March 8, 2011 a true and correct copy of the foregoing emergency motion to compel has been electronically filed on the CM/ECF system, and sent via email to Neal Massand.

/s/ Ernest P. Nycz  
ERNEST P. NYCZ